IN THE

Supreme Court of the United States

October Term, 1976

No. **76-1643**

SAMUEL D. MAGAVERN, As Executor and Trustee
of the Last Will and Testament of
MARGARET C. DUNCAN, Deceased,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Samuel D. Magavern, as Executor and Trustee of the Last Will and Testament of Margaret C. Duncan, deceased, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in the above-entitled case.

Opinions Below

The opinion of the Court of Appeals was not reported but is printed in Appendix "B", p. 4a, *infra.* The opinion of the District Court for the Western District of New York is reported at 415 F.Supp. 217, and is reprinted in Appendix "D", p. 22a, *infra.* The opinion of the New York State Surrogate's

Court of Erie County in *In Re Will of Duncan* is reported at 80 Misc. 2d 32 and 362 NYS2d 788, and is reprinted in Appendix "E", p. 31a, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on February 24, 1977, and is reprinted in Appendix "C", p. 20a, *infra*.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.Code, § 1254(1). The basis of jurisdiction of the District Court was Title 26, U.S.Code, § 7426(a)(1).

Questions Presented

Two substantial and paramount issues are involved in this case:

1. Should the holding of *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967), that federal authorities are not bound by a state trial Court's determination of property interests under federal estate tax laws, be adhered to where the United States, after being made a party to and duly served with notice of a state Surrogate's Court will construction proceeding, appears on two occasions, files affidavits and memoranda of law, and argues against the Court's jurisdiction, but refuses to argue the merits of its position and refuses to appeal to the state's highest Court from the state Court's adverse decision, determining that there was no property or rights to property belonging to one of several trust beneficiaries who was a debtor of the United States, but rather only a mere expectancy?

2. Is the result reached by the majority of the Court of Appeals, in construing the law of New York State contrary to

the state Court's decision and the settlor's expressed instructions, in conflict with the applicable state law as determined by the highest Court of New York State?

Statutes Involved

The Federal statutes involved in this case are as follows: Title 26, U.S. Code, Sections 6321, 6332(a), and 7426(a)(1), the pertinent provisions of which are set forth in Appendix "A" beginning at p. 1a, *infra*.

The State statutes involved are the following sections of the New York State Surrogate's Court Procedure Act ("SCPA"), found in book 58A of McKinney's Consolidated Laws of New York, Annotated: §§ 205, 206(1), and 1420(1) and (4), the pertinent provisions of which are set forth in Appendix "A" beginning at p. 2a, *infra*.

Statement of Facts

In 1965, Margaret C. Duncan died, as a domiciliary of Erie County, New York, leaving a last will and testament by the terms of which, under Article III thereof, the residue of her estate was to be held in a sprinkling trust and administered by Petitioner for the benefit of the family group consisting of her husband, Matthew Duncan, her son, Thomas W. Doran ("Doran"), his children and the issue of his children. Letters Testamentary and Letters of Trusteeship were issued by the New York State Surrogate's Court of Erie County to Petitioner who, since 1965, has been and still is the Trustee of said trust. During the years 1965 through 1967, no payments were made to Doran. In each of the years from 1968 to 1973, Doran received small monetary amounts from the trust.

On December 5, 1973, Petitioner, as trustee, was served with Respondent's notice of levy, under 26 U.S.C. §§6321 and 6331, purporting to attach all "property and rights to property" belonging to Doran.

Since "property" and "rights to property" are determined by state law *(Aquilino v. United States,* 363 U.S. 509), Petitioner on June 27, 1974, commenced a will construction proceeding *(In Re Will of Duncan, supra;* App. "E", p. 31a, *infra)* pursuant to SCPA § 1420 (App. "A", p. 2a, *infra*) in the Surrogate's Court of Erie County [which Court, as the probate Court, appointed Petitioner, as trustee, and has continuing and exclusive jurisdiction over matters affecting the estate (SCPA §§ 205, 206, App. "A", p. 2a, *infra*)] to determine the construction and effect of the subject will, in particular, Article III thereof, and to determine whether there was any "property" or "rights to property" belonging to Doran, under the terms of the trust, to which Respondent's levy could attach. Respondent was made a party to, was duly served with notice of and appeared in the Surrogate's Court construction proceeding, but, on both appearances (July 24, 1974 and September 25, 1974) filed affidavits and memoranda of law contesting the Surrogate's Court jurisdiction, and despite ample opportunity, refused to argue the merits of its position.

On August 23, 1974, due to the applicable statute of limitations, Petitioner commenced this wrongful levy action, pursuant to 26 U.S.C. §7426(a)(1), in the District Court. Prosecution, however, was stayed pending the Surrogate's Court decision.

On December 27, 1974, the Surrogate's Court rendered its decision *(In Re Will of Duncan, supra;* App. "E", p. 35a, *infra)* in which it was determined that, while the Court had no jurisdiction to vacate Respondent's levy, it did have jurisdiction to determine the construction and effect of Article III of said will under New York State law as it pertained to the beneficiaries' interest, in particular, Doran's, and it determined that

> "[t]he only interest of Thomas W. Doran and the other beneficiaries is merely one of expectancy, and the trustee cannot be compelled to transfer to any member any part of the trust property." 80 Misc. 2d at p. 35, 362 NYS2d at p. 791;

and that

> "the beneficiaries of the trust created under the Last Will and Testament of Margaret C. Duncan have no absolute right to receive income or principal from the trust and that therefore there is no property or rights to property belonging to the beneficiaries, specifically Thomas W. Doran, the subject of the levy." 80 Misc. 2d at pp. 35-36, 362 NYS2d at p. 792.

In accordance therewith, the Surrogate entered his Order (App. "F", p. 36a, *infra*) on January 27, 1975. Despite the legislative intendment and mandate of New York State, as set forth in SPCA § 1420(4) [App. "A", p. 3a, *infra*], Respondent refused to appeal the Surrogate's adverse decision and order to the state's highest Court.

On the basis of the Surrogate's Court decision and order, Petitioner moved for summary judgment in the District Court, which denied Petitioner's said motion and granted Respondent's motion for partial summary judgment declaring the tax lien valid. The District Court reasoned that the Surrogate's Court will construction proceeding was *ex parte;* and that, on the basis of this Court's decision in *Commissioner v. Estate of Bosch, supra,* neither Respondent nor the District Court were bound by the Surrogate's determination; and, contrary to the Surrogate's decision and the expressed instructions of the settlor, it concluded that:

> "under New York State law, the beneficiary had 'rights to property' in that he had a right to a reasonable sum under the settlor's instructions for his 'maintenance and care', and that therefore, the Government's levy is valid. The determination of the actual amount of the trust income and/or principal reached by the levy must await trial." (415 F.Supp. at p. 221)

Due to Doran's death on February 14, 1975, and in the interest of expediency and elimination of protracted litigation with the necessary costs involved in proceeding to trial, Petitioner and Respondent stipulated to the amount available as being $2,305.00, whereupon the District Court entered a judgment in favor of Respondent, from which Petitioner appealed to the Court of Appeals.

The Court of Appeals by a 2-to-1 decision (App. "B", pp. 5a, 12a, *infra*) which, by its own words, recognizes the significance of the legal issues involved and contains expressions of some doubt by the majority, entered a judgment (App. "C", p. 21a, *infra*) affirming the District Court's judgment.

REASONS FOR GRANTING THE WRIT

As the Petitioner realizes and the majority of the Court of Appeals recognized and stated in its Opinion (App. "B", p. 5a, *infra*), while the dollar amount being contested is relatively small, "the legal issues confronted, however, are nonetheless significant". There are involved in this controversy, substantial and intensely important questions, both in terms of public interest and legal doctrine, that create conflicts between the State and Federal jurisdiction as to personal and state rights to justify the granting of a Writ. The basis for Petitioner's application for a Writ is to request and

urge this Court to examine the decision below in relation to this Court's holding in *Commissioner v. Bosch, supra,* with a view toward clarifying and applying the so called *Bosch* doctrine as it relates to the law and facts in this particular case to the end that the *Bosch* doctrine be limited in its application to lower state Court decisions and proceedings, in which the Government has an interest, a) which are truly *ex parte* in the sense that the Government was not made a party to or given an opportunity to be heard and contest such proceeding or appeal from an adverse decision; and b) which directly involve federal statutes, as opposed to a proceeding, as in this case, which involve state statutes and state law pertaining to property rights and collateral issues which may or may not affect federal statutes; and c) which involve legal issues upon which the state's highest Court has not spoken, as opposed to having the state's highest Court speak to the law of the specific case; thus, thereby avoiding the interpretation which would require each individual case being taken to the state's highest Court, rather than a situation, such as presented by this case, in which the state's highest Court has spoken directly on the question involved, as hereinafter set forth. To apply the doctrine otherwise would, as in this case, preclude the successful party from appealing to the state's highest Court to have it speak upon the state law as it relates to the specific facts involved; make a farce out of the state's rights, jurisdiction, and judicial machinery; deprive the state's highest Court from determining the state's law; duplicate trials and both judicial and legal efforts; and produce the harsh, unfair, choatic and anomalous conflicts between State and Federal rights and policies, as are so clearly illustrated in this case.

I. As to *Commissioner v. Bosch* doctrine.

It is agreed, by both the parties and all the Courts, that

> "The threshold question in this case, as in all cases where the Federal Government asserts its tax lien is whether and to what extent the taxpayer had 'property' or 'right to property' to which the lien could attach. In answering that question, *both federal and state courts must look to state law . . .*" (Emphasis added) *Aquilino v. United States,* 363 U.S. 509, 512-513 (1960).

Thus, it appears to be agreed that in determining what is "property" or "rights to property", the law of New York State is controlling.

The majority of the Court of Appeals and the District Court, in arriving at a result contrary to the Surrogate's Court decision, *supra,* seek to nullify the Surrogate's decision by using as their authority, *Commissioner v. Bosch, supra,* on the grounds that the Surrogate's construction proceeding was *ex parte;* that Respondent was not made a party to said proceeding; that therefore, the Surrogate's decision and order were not binding upon Respondent; that the highest Court of New York State had not spoken on the point involved; and, that by reason thereof, the District Court was not bound by the Surrogate's decision regarding Doran's "property" or "rights to property" under the terms of the subject trust.

Petitioner disagrees with the lower Court's application of this Court's *Bosch* doctrine and submits that the heart and purpose of the *Bosch* decision is based on the infliction upon the federal taxing authorities of a lower state Court ruling in a matter in which the United States has an interest and 1) in which it had no opportunity of being heard (*ex parte,* non-adversary ruling), and 2) upon which the highest Court of the state has not spoken. These considerations are absent in the

case at bar, as Respondent was made a party to, served with notice of, appeared, on two occasions, in, and filed affidavits and memoranda of law with the Surrogate in the state Court construction proceeding, in an adversary position. After appearing, Respondent was advised by the Surrogate that while the Court had no jurisdiction to vacate the levy, it did have and would maintain jurisdiction over the construction and effect of the decedent's testamentary trust and determine whether the trust beneficiaries, in particular Doran, had any property rights in said testamentary trust. *In Re Will of Duncan,* 32 Misc 2d at p. 34, 362 NYS2d at p. 790.

Black's Law Dictionary defines an *ex parte* proceeding as:

> "A proceeding at the instance and for the benefit of one party only and *without notice or opportunity to oppose to any party adversely affected;* such a proceeding necessarily presupposes that there is no adverse party." (Emphasis added) *Black's Law Dictionary* [Revised 4th Ed. (1968)]; 1 C.J.S., Actions, § 1, p. 957.

By contrast, an *adversary* proceeding is:

> "A proceeding in which the party seeking relief has given legal warning to the other party, and afforded the latter an opportunity to contest it." *Black's Law Dictionary,* (supra) at p. 73 "*A proceeding is not ex parte where an adverse party is given notice and an opportunity to be heard, but chooses not to appear to oppose.*" (Emphasis added). *Black's Law Dictionary, (supra)* at p. 662.

As mentioned, Respondent was made a party to and given due and proper notice of the Surrogate's proceeding by service of a Show Cause Order on June 28th, 1974. It appeared in the Surrogate's Court and filed an affidavit on July 24th, 1974. It further appeared and filed a memorandum of law with the Surrogate's Court on September 25th, 1974. Despite Respondent's contention and the lower federal Courts' con-

clusion to the contrary, a careful reading of the Surrogate's decision (App. "E", pp. 31a-35a, *infra*) and Order (App. "F", pp. 36a-38a, *infra*), containing several references to Respondent and its levy, clearly shows that the Surrogate, while conceding lack of jurisdiction to vacate the levy, considered Respondent a party to the construction proceeding in determining Doran's property rights, and did not consider same as an *ex parte* proceeding.

Additionally, both lower federal Courts erroneously conclude that the highest Court of the State of New York has not passed on the point in question, but then proceed to quote from, distinguish, and base their decisions upon rulings on the point in question by the highest Court of New York State in *Hamilton v. Drogo*, 241 N.Y. 401 (1926), and *Sand v. Beach*, 270 N.Y. 281 (1936); these cases are analyzed and discussed in depth under subparagraph II hereof, *infra*. It is, therefore, submitted that the safeguards set forth in *Bosch* to protect the Government were satisfied and that Respondent and the lower federal Courts were bound by the Surrogate's decision and order as they pertained to the property rights of Doran under the terms of the instant trust. It was up to all claimants who received proper notice to choose at their peril between pressing their claims or permitting the matter to default. Respondent argued against the Court's jurisdiction and lost, but chose not to argue the merits of its position. Since the nature of the construction proceeding was *in rem*, and not *in personam*, the resultant "*in rem*" judgment was conclusively binding upon Respondent and could not be collaterally attacked by Respondent or the lower federal Courts. *United States v. Bleasby* (3rd cir. 1958), 257 F2d 278.

Furthermore, Petitioner submits that the *Bosch* doctrine is indecisive as to the instant case in that its application is limited to its particular facts and its holding is limited to the

federal estate tax liability under a federal statute (26 U.S.C. § 2056) which, as discussed at length by this Court (387 U.S. at pp. 463-464) has a legislative history specifically directing that only "proper regard", not finality, is to be accorded to a state Court's decree affecting the federal allowance of estate marital deductions.

Lastly, but equally important, Petitioner respectfully submits and vigorously urges that it certainly was not this Court's intention in *Bosch* to make it possible for the Federal Government, which was specifically made a party, to appear in a state Court proceeding, unsuccessfully contest the jurisdiction, and then default, lose on the merits, and refuse to appeal, thus leaving the successful party no right to appeal to the state's highest Court to determine the state's law, and thereby automatically open the door for the Government to have the federal Courts make state law because of lack of ruling by the state's highest Court. *Cf. Matter of Rosenberg*, 269 NY 247 (involving similar legal but factually different issues in which the Government intervened in the Surrogate's Court construction proceeding to enforce its tax lien against a *sole* beneficiary's interest in a spendthrift trust; from adverse orders of the Surrogate's Court as well as the state appellate division, the Government appealed to the state's highest Court, which reversed and ruled in favor of the Government). To permit the Government to pick and choose which state Court proceedings by which it will agree to abide (*i.e.*, appealing some adverse rulings and not others) is a clear debasement and deprivation of the rights of the states to interpret and make their own laws. To permit Respondent to do so necessarily results in making a farce out of the state's rights, jurisdiction, and judicial machinery; deprives the state's highest Court from determining the state's law; duplicates both judicial and legal efforts and trials; and

produces the harsh, unfair, choatic and anomalous conflicts between State and Federal rights and policies, as are so clearly illustrated in this case. As this Court recognized in *Bosch*, "the state's highest court is the best authority on its own law" 387 U.S. p. 465. The contention of Respondent and the decision of the lower federal Courts on this point, if adhered to by this Court, would clearly violate, abridge and deprive the state's rights in determining its own law and would completely disregard the New York State's legislative intendment and mandate concerning will construction proceedings, to wit:

> SCPA § 1420. Proceeding for construction of will; effect of decree.
>
> ". . . (4. *A decree in any proceeding authorized in this section . . . unless reversed or modified on appeal, shall thereafter be binding and conclusive in all courts upon all parties to the proceeding and upon their successors in interest as to all questions of construction or interpretation of the will therein or thereby determined and of all rights and obligations of the parties involved in the construction, depending thereon, or resulting therefrom.*" (Emphasis added) App. "A" p. 3a, *infra.*

Petitioner urges this Court to take jurisdiction in this case because the lower federal Courts' rationale under the instant facts certainly cannot be the purpose and intendment of the *Bosch* doctrine; but, rather the purpose of *Bosch* is as above stated, to make sure that the United States Government is not bound by an *ex parte*, nonadversary decision. Therefore, it is respectfully submitted, that the Court of Appeals and the District Court erred, as a matter of law, in determining, under the facts herein, that neither Respondent nor they were bound, as a matter of law, by the Surrogate's decision that "there is no property or rights to property belonging to . . . Thomas W. Doran, the subject of the levy." 32 Misc. 2d at pp. 35-36, 362 N.Y. S2d at p. 792.

II. As to conflict between decision below and New York State Law.

In determining what is "property" or "rights to property" under 26 USC §§6321 and 6332, the law of New York State is controlling. *Aquilino v. United States, supra.* With respect to this issue, Petitioner strongly urges that the majority of the Court below have misapplied the law of New York State in a way which sharply conflicts with the applicable law of New York State or pronounced by the highest Court of New York State. Even the majority opinion (App. "B" at p. 12a, *infra*) of the Court of Appeals expresses some doubt as to the conclusion of the District Court that "under New York State law, the beneficiary [Doran] had 'rights to property' in that he had a right to reasonable sum under the settlor's instructions for his 'maintenance and care', and that therefore the Government's levy is valid." *Magavern v. United States*, 415 F. Supp. 217, 221; App. "D" at p. 30a, *infra.*

The pertinent provision of the trust at issue reads as follows:

> "1. This trust shall be held and administered for the benefit of the *family group*, consisting of those from time to time living of my husband, MATTHEW DUNCAN, my son, THOMAS W. DORAN, his children, and the issue of his children. My Trustee shall pay over or use, apply and expend *whatever part or all of the net income or principal (even to the point of exhaustion thereof) or both,* thereof *he shall deem proper or necessary* in order to provide *comfortable support, maintenance and/or education (at any level)* to the *individual* members of the said family group. *My Trustee shall not feel bound in making such payments, uses, applications or expenditures, to observe any rule or precept of equality as between the individual members of said family group.*" (Emphasis added.)

Thus, the first sentence defines the individual members of the "family group" who are eligible to receive benefits (*i.e.*, husband, son, grandchildren and great grandchildren). The second sentence sets forth the purpose and authorizes the trustee to expend, apply or use whatever part or all of the net income or principal, or both, even to the point of exhaustion. to provide comfortable support or maintenance and/or education to the individuals of the family group. The third and last sentence expressly provides for no rule or precept of equality as between the individual members of the "family group". It is to be noted that the word "individual" is used in referring to recipients of use in the singular sense. Thus, for example, the trustee could completely exhaust the trust fund (income and principal) for the education of any member or members of a class that was in the process of being educated, without reserving any funds for the settlor's husband, son, or other members of the classes of grandchildren and great grandchildren.

After concluding that the state's highest Court has not spoken on the point (one of the *Bosch* prerequisites, *supra*), both the District Court and the majority of the Court of Appeals below proceed to quote from, distinguish, and base the results of their decisions upon New York State law as pronounced by the highest court of New York State in *Sand v. Beach*, 270 NY 281 (1936), and *Hamilton v. Drogo*, 241 NY 401 (1926). The majority of the Court of Appeals, in affirming the District Court, reasoned that "the facts in the instant case are more akin to *Sand* than they are to *Drogo*," and that "[t]he trustee is bound to distribute *some* trust income to each of the beneficiaries." (Emphasis added) App. "B". at p. 14a, *infra*.

In *Sand*, the New York State Court of Appeals was called upon to construe a testamentary trust which provided that the trustee hold the trust fund

> "for the following uses and purposes, to wit: To receive the rents, income, income and proceeds thereof, and to pay the same either direct and in person to *my nephew*, Stanley Y. Beach, *or* for the use and benefit of *my said nephew and those dependent upon him*, during his lifetime, and in the manner and amounts, and at the times and for the purposes that said Trustee, or his successor or successors in his discretion may deem best ..." 270 NY at p. 283. (Emphasis added).

Thus the *Sand* beneficiary had a right to require payment to him of the *entire* net income of the trust fund, either directly to him or through its application for the use and benefit of him *and* those dependent upon him. As the *Sand* Court reasoned

> "If the discretion of the trustee were wide enough to permit the trustee to pay or apply to the use or benefit of *some person other than the judgment debtor*, then to the extent of such payment or application the income of the trust fund would in no sense be due or owing to the judgment debtor. *The income would then belong under the will to another person, and the judgment debtor would have no interest in it.* So we decided in the case of *Hamilton v. Drogo*, (supra) ... Here the situation is quite different. The trustee cannot, in the exercise of his discretion, apply the income of the trust fund exclusively for the benefit of the wife of the judgment debtor. If he does not pay the income to the judgment debtor, the trustee must apply it for the use and benefit of the judgment debtor *and* his dependents ... Thus the express addition in the will of the words 'and those dependent upon him' does not detract from the right of the judgment debtor to require payment to him of the *entire* net income of the trust fund or its application for his use and benefit." (Emphasis added). 270 NY at pp. 285-286.

Similarly, the same Court decided *Matter of Rosenberg*, 269 NY 247 (1935), holding that the Federal Government may en-

force its tax lien against the interest of a *sole beneficiary* of a spendthrift trust.

By contrast, in *Hamilton*, the New York State Court of Appeals was called upon to construe a trust instrument, in which the testatrix bequeathed to her trustee a sum of money in trust, during the life of her son, to apply the annual income

> "for the maintenance and support or otherwise, for the benefit of all or any one or more exclusively of the other or others of him, *my said son, his wife and children or other issue* as my trustees in their sole and uncontrolled discretion think fit." (Emphasis added). 241 NY at p. 403.

The Court held that there was nothing that could be reached by levy and only in the event that the trustee exercised an allotment in favor of the son, could it be attached.

> "If ever the day of payment arises, the lien of the execution attaches ... [however] in the present case no income may ever become due to the judgment debtor. We may not interfere with the discretion which the testatrix has vested in the trustee any more than her son may do so. Its judgment is final." 241 NY at p. 404.

Similarly, based on *Hamilton*, the Surrogate decision (*In Re Will of Duncan, supra;* App. "E" at p. 35a, *infra*), in the state Court construction proceeding, held that

> "[t]he creditor, in this case the United States Government, cannot compel the trustee to make a payment pursuant to the terms of the trust where the beneficiary, individually, could not compel the trustee to make such a payment.
>
> "Where the discretion is conferred upon a trustee, the courts will not interfere with the exercise of discretion." (Citations omitted).

> "The *only interest* of Thomas W. Doran and the other beneficiaries of the trust *is merely one of expectancy*, and the trustee cannot be compelled to transfer to any member any part of the trust property *Morrow v. Apple*, 26 F2d 543) ...
>
> "It is the decision of this court that the beneficiaries of the trust ... have *no absolute right to receive income or principal* from the trust and that therefore *there is no property or rights to property belonging to the beneficiaries, specifically Thomas W. Doran, the subject of the levy.* If, however, the trustee does at any time elect in his discretion to pay to Thomas W. Doran any of the income or principal of the trust, the amount of said payment will be subject to the levy unless the levy has been removed or vacated by the Federal District Court." (Emphasis added). 80 Misc. 2d at pp. 35-36, 362 NYS 2d at pp. 791-792.

Petitioner submits that the decision of the Surrogate, *supra*, and the well-reasoned dissenting opinion of Circuit Judge Oakes in the Court of Appeals below properly set forth the correct law of the State of New York on this issue, and that the District Court and the majority of the Court of Appeals below erred, as a matter of law, in deciding that, under New York State law, the beneficiary-debtor, Doran, had "rights to property" under the terms of the trust involved herein.

A careful analysis of the instant trust compels the conclusion that it is more similar to the *Hamilton* trust (several beneficiaries), than to the *Sand* trust (single beneficiary). Unlike the *Sand* trust, the emphasis of the Duncan trust is on meeting the needs of several eligible members of the "family group", including any amounts that may be required for the maintenance or support of her husband, her son, her grandchildren or her great grandchildren, or for the education (at any level) of her grandchildren and her great grandchildren, authorizing expenditures, even to the point of exhausting

both income and principal, without observing any rule or precept of equality. Such a trust has often been called a "sprinkling trust" or "blended trust". G. G. Bogert and G. T. Bogert, *The Law of Trusts and Trustees*, § 230 (2d Ed. 1965). Restatement (Second) of Trusts, § 161, entitled "Inseparable Interests", provides that

> "If a trust is created for a group of persons and the interest of one member of the group is inseparable from the interests of the others, he cannot transfer his interest and his creditors cannot reach it."

To the same effect, see Restatement (Second) of Trusts, §§ 155(1) (Comment(d)); 2 *Scott on Trusts*(3d Ed.), § 155; *Myers v. Russell*, 60 Misc. 617, 112 NYS 520; *Morrow v. Apple*, 26 F2d 546; *Brownell v. Leutz*, 149 F. Supp. 98. The beneficiaries' interest is merely one of expectancy, not absolute right. *Nichols v. Eaton*, 91 U.S. 716 (1875); *Herzog v. Commissioner* (2d Cir. 1941) 116 F2d 591; *Morrow v. Apple*, *supra*; *Brownell v. Leutz*, *supra*; *Hamilton v. Drogo*, *supra*; *In Re Will of Duncan*, *supra*, App. "E" at pp. 34a, 35a, *infra*.

The majority of the Court of Appeals, relying on *Sand*, after expressing some doubt, attempt to distinguish the facts in the present case from *Hamilton* by the fact that Margaret Duncan, after defining the "family group" as consisting of her husband, her son, her grandchildren and her great grandchildren, used the words "[m]y trustee shall not feel bound . . . to observe any rule or precept of equality as between the individual members of said family group," rather than the words "one or more exclusively of the other or others." It is submitted that this distinction is without legal merit, especially in light of the other phrase "whatever part *or all of the net income or principal (even to the point of exhaustion thereof) or both*, thereof he shall seem proper or necessary in order to

provide comfortable support, maintenance and/*or education (at any level) to the individual members of said family group.*" It seems self-evident that in authorizing the trustee not to observe any rule or precept of equality as between the individual members of the family group, that equality begins at zero. The majority of the Court of Appeals below, however, would seem to preempt the settlor's decision and express instruction and interfere with the trustee's discretion by establishing a platform, whether $1.00 or $2,300, and to the extent of such platform or amount deny the trustee the settlor's unequivocal instruction that he does *not* have to observe any rule or precept of equality. The majority of the Court of Appeals and the District Court have substituted Petitioner's discretion and judgment with theirs, that there is equality required to the extent of support for the son, Doran. Such interference was expressly denounced by this Court in *Nichols v. Eaton*, 91 U.S. at pp. 724-725. Petitioner submits that such a construction does violence to the plain and natural import of the words used. The English language can express a given result in many ways which all arrive at the same result (six, one-half dozen, 5 + 1, 2 x 3). The intent of the decedent is the cardinal principle in construing a will. No cases need be cited to justify this universally accepted principle of construction. It is clear that the intent of Margaret C. Duncan was to give the trustee the full right to use or apply the trust assets as, in his sole discretion, he deemed for the comfortable support, maintenance and/*or* education of any individual or member of a class of the defined "family group". The law has no patience with nominal or technical amounts; both equality and inequality are measured from ZERO, not from an amount superimposed by a Court. It is respectfully submitted that Doran's only interest was one of expectancy, and Respondent, as a creditor, had no greater rights than Doran, the *cestui que*

trust, who had no absolute right at all in the trust *res*. Respondent may not take one person's property to satisfy another person's obligation. *United States v. Lester*, 235 F.Supp. 115.

Lastly, it should be pointed out that there was no justification on the part of either the District Court nor the majority of the Court of Appeals for interfering with the trustee's discretion. It is well-settled New York law that Courts will not interfere with the exercise of the discretion vested in the trustee in the absence of clear evidence showing that he has exercised his discretion dishonestly or unfaithfully. *Hamilton v. Drogo, supra; Nichols v. Eaton, supra.* At no time did the beneficiary, Doran, or Respondent go into any Court and contend that Petitioner was exercising his discretion dishonestly or in bad faith. Upon being served with Respondent's notice of levy, Petitioner in good faith commenced a construction proceeding in the Surrogate's Court to determine whether and to what extent he possessed "property" or "rights to property" belonging to Doran. As an interested person, Respondent was made a party to, served with notice of, and was given ample opportunity to assert the merits of its contention in the construction proceeding. Therefore, it is submitted that the majority of the Court of Appeals' reliance on *Matter of Rosenberg*, 269 NY 247 (1935), *Collister v. Fassitt*, 163 NY 281 (1900), and *Ireland v. Ireland*, 84 NY 321 (1881) for the proposition of New York law that the aggrieved trust beneficiary can enforce his right to trust property or income against a trustee who refuses to exercise his discretion, as directed in the trust instrument, is entirely irrelevant and immaterial, as not being supported by any facts involved in the case at bar, and therefore has no application to this controversy.

Conclusion.

For the reasons stated herein, this Petition for Certiorari should be granted.

Respectfully submitted,

MAGAVERN, MAGAVERN, LOWE,
BEILEWECH & DOPKINS,
Attorneys for Petitioner.

May , 1977.

Of counsel:
Samuel D. Magavern,
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Buffalo, New York.

APPENDIX "A".

Statutory Provisions.

Title 26, U.S. Code:

Sec. 7426. Civil actions by persons other than taxpayers.

(a) Actions permitted.

(1) Wrongful levy.—If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

Sec. 6321. Lien for taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Sec. 6332. Surrender of property subject to levy.

(a) Requirement.—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the

Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

New York State Surrogate's Court Procedure Act:

Sec. 205. Effect of exercise of jurisdiction.

Jurisdiction once duly exercised over any estate or matter by the court excludes the subsequent exercise of jurisdiction by another surrogate's court over the same estate or matter except as specially prescribed by law. All further proceedings in the same estate or matter in a surrogate's court must be taken in the same court.

Sec. 206. Exclusive jurisdiction.

The surrogate's court of each county has jurisdiction exclusive of every other surrogate's court over the estate of

1. any domiciliary of the county at the time of his death, disappearance or interment;

Sec. 1420. Proceed for construction of will; effect of decree.

1. A fiduciary or a person interested in obtaining a determination as to the validity, construction or effect of any provision of a will may present to the court in which the will was probated a petition showing the interest of the petitioner, the names and postoffice addresses of the other persons interested, the particular portion of the will concerning which petitioner requests the determination of the court and the necessity for construction.

If the application be entertained process shall issue to all persons interested in the question to be presented to show cause why the determination should not be made. On the return of process the court shall take such proof and shall make such decree as justice requires.

. . . 4. A decree in any proceeding authorized in this section or a decree settling an account of a fiduciary or a decree on probate which construes or interprets any portion of a will, unless reversed or modified on appeal, shall thereafter be binding and conclusive in all courts upon all parties to the proceeding and upon their successors in interest as to all questions of construction or interpretation of the will therein or thereby determined and of all rights and obligations of the parties involved in the construction, depending thereon, or resulting therefrom.

APPENDIX "B".

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 362—September Term, 1976.
(Argued January 5, 1977 Decided February 24, 1977.)
Docket No. 76-6111.

SAMUEL D. MAGAVERN, As Executor and Trustee of the Last Will and Testament of MARGARET C. DUNCAN, Deceased,
Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,
Defendant-Appellee.

Before: Moore, Oakes and Timbers, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Western District of New York, Honorable John T. Curtin, *Chief Judge,* ordering enforcement against taxpayer of a levy brought by the United States pursuant to 26 U.S.C. §6321.

Affirmed.

Samuel D. Magavern, Esq., Buffalo, New York (Magavern, Magavern, Lowe, Beilewich & Dopkins, Charles B. Draper, of counsel), *for Plaintiff-Appellant.*

Alfred S. Lombardi, Attorney, Tax Division, Department of Justice, Washington, D. C. (Scott P. Crampton, Assistant Attorney General, Gilbert E. Andrews, Ernest J. Brown, Attorneys, on the brief; Richard J. Arcara, United States Attorney, of counsel), *for Defendant-Appellee.*

Appendix "B"—Opinion of the Court of Appeals.

MOORE, *Circuit Judge:*

This case arises out of the efforts of the Internal Revenue Service to satisfy an outstanding tax assessment by levying on what it asserts is the taxpayer's interest in a testamentary trust established by his mother. The dollar amount being contested is relatively small, the parties having stipulated that the Government seeks to acquire only approximately $2300. The legal issues confronted, however, are nonetheless significant.

I.

Thomas W. Doran ("Doran"), the taxpayer herein, was deficient in his federal tax payments for various amounts during 1965, 1966 and 1968-1971, resulting in the assessment against him of federal taxes and interest in the aggregate amount of $112,753.51. On November 7, 1974 a total of $108,303.96, plus penalties and interest, remained unpaid.[1]

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[1] The breakdown of this amount was as follows:

Period	*Type of Tax*	*Date Assessed*	*Unpaid Balance*
1965	Income	10/ 2/72	$ 1,182.98
1966	Income	5/19/67	4,804.48
1969	Income	6/ 5/70	6,809.56
1970	Income	7/31/71	248.77
1965 (1Q & 2Q)	W/H & FICA	12/ 1/72	1,441.82
1968 (2Q-4Q)	W/H & FICA	11/16/72	48,857.67
1965-1971	W/H & FICA	12/ 1/72	44,958.68
			$108,303.96

As might be expected, the Government began to seek assets against which it could levy to satisfy this large unpaid assessment.

One asset against which the Government proceeded is the trust at issue here. Margaret C. Duncan, Doran's mother, had died in 1965 leaving the residue of her estate in trust for her husband, her son, Doran, and the children and grandchildren of Doran. In each of the years from 1968 to 1973, Doran had received small monetary amounts from the trust.[2] On December 5, 1973, the Government served a notice of levy under §§6321 and 6331 of the Internal Revenue Code ("Code"), 26 U.S.C. §§6321 and 6331, on the trustee of the trust, appellant herein, Samuel D. Magavern. The levy purported to cover "all property and rights to property" belongs to Doran. However, the trustee refused to honor the levy on the ground that under the terms of the trust, Doran had no rights in the trust property.

On June 27, 1974, the trustee commenced a proceeding in the Surrogate's Court of Erie County, New York, seeking to

[2] Payments were made to Doran as follows:

Year	*Amount of Distribution*
1968	$1,500.00
1969	2,000.00
1970	1,039.61
1971	3,000.00
1/ 1/72-10/31/72	2,000.00
11/ 1/72-10/31/73	3,500.00

The Trustee had not paid Doran any trust proceeds from the date of the levy until Doran's death on February 19, 1975. The amount here in issue, stipulated by the parties to be $2,305.50, is thus the amount allegedly due Doran for the period of December 5, 1973 (the date of the levy) to the date of his death.

determine the validity and effect, if any, of the notice of levy on Doran's beneficial interest in the trust. The Government appeared specially in the Surrogate's Court, arguing only that the Surrogate had no jurisdiction to affect the levy. On December 27, 1974 the Surrogate filed a decision holding that he did not have jurisdiction to "vacate, annul, cancel or discharge" the levy, but that pursuant to his continuing jurisdiction over Margaret Duncan's Last Will and Testament he could decide whether or not the trust beneficiaries had any property rights in the trust. Accordingly, he proceeded to hold that by the trust's terms the trustee had complete and sole discretion to withhold the income from any individual member of the family group, and that as a consequence Doran had no property rights in the trust. *In re Will of Duncan*, 80 Misc. 2d 32, 362 N.Y.S.2d 788 (Surr. Ct. Erie Co., 1974).

On August 23, 1974, while the Surrogate's Court proceeding was still pending, the trustee commenced the instant action in the Western District of New York seeking, pursuant to §7426(a) of the Code, 26 U.S.C. §7426(a), to enjoin enforcement of the levy. Upon announcement of the Surrogate's decision, the trustee moved for summary judgment on the basis of the Surrogate's finding that Doran had no right to property in the trust, and the Government cross-moved for enforcement of the levy. The district court on June 8, 1976, rendered its decision, reported in 415 F. Supp. 217. It reasoned that under New York law the trust instrument by mandatory language requires the trustee to pay at least some income to each of the beneficiaries, including Doran, so that Doran had a right to the trust property which was subject to levy. Moreover, the district court held that the contrary decision of the Surrogate's Court, though it must be afforded

proper regard, was not binding on a federal court. Judgment was entered for the Government in the stipulated amount, and the trustee timely brought this appeal.

II.

The Internal Revenue Code contains several sections dealing with the use of federal tax liens to collect unpaid taxes. *See* Plumb and Wright, *Federal Tax Liens* (2d ed. 1967). Section 6321[3] provides that a lien shall attach in favor of the United States on all property and rights to property of any person who, after demand, neglects or refuses to pay federal taxes for which he is liable. Section 6332[4] provides that any person in possession of property or rights subject to levy must surrender them upon demand of the Secretary or his delegate.

It is long-established, and conceded by both parties to this case, that in asserting its federal tax lien, the Government

[3] Section 6321, 26 U.S.C. §6321, reads as follows:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

[4] Section 6332, 26 U.S.C. §6332, reads as follows:

"(a) *Requirement.*—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process."

must look to state law for a determination of what legal rights and interests, if any, comprise "property and rights to property" to be attached. *Aquilino v. United States*, 363 U.S. 509 (1960); *United States v. Durham Lumber Co.*, 363 U.S. 522 (1960); *United States v. Bess*, 357 U.S. 51 (1958). As the Supreme Court stated in *Aquilino:*

> "The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could attach. In answering that question, both federal and state courts must look to state law, for it has long been the rule that 'in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute.' *Morgan v. Commissioner*, 309 U.S. 78, 82." 363 U.S. at 512-13 (footnote omitted).

Both parties here agree that the question before us is thus whether or not under New York law Doran had a property interest or right to property in the trust established by his mother.

Unfortunately, the parties' agreement as to the authority of New York law does not insure accord as to what that applicable law is, or how the federal courts should discover it. The trustee strongly urges upon us that the decision of the Surrogate's Court is binding on the federal courts. He suggests that under New York law the Surrogate's Court, the court which originally probated Mrs. Duncan's will, has continuing, exclusive jurisdiction over her estate, including construction of her will. He concludes that the Surrogate's in-

terpretation of the trust instrument must be considered an *in rem* judgment binding for all purposes, in effect prohibiting any varying interpretations of the language of the will by federal courts.

But the Supreme Court has conclusively rebutted the trustee's argument. In *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967), the Court decided two cases concerned with the effect a federal court should give to a decision by a lower state court. In *Bosch*, the state court holding concerned the validity of a decedent's release of a power of appointment over a New York trust. The taxpayer had filed a petition in the Supreme Court of New York to obtain a decision on the validity of the release, which if declared invalid could have qualified the corpus of the trust for the federal tax marital deduction, 26 U.S.C. § 2056. The state court held the release a nullity and the United States Tax Court looked on that decision as binding. A divided panel of this court affirmed, 363 F.2d 1009 (1966), but the Supreme Court reversed. The Court explained that a lower state court decision was a significant factor for a federal court in ascertaining state law, but federal tribunals should not consider lower state court decisions binding where the highest state court has not spoken on the point. As Mr. Justice Clark stated, speaking for the Court:

> "[W]hen the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling. This is but an application of the rule of *Erie R. Co. v. Tompkins*, [304 U.S. 64 (1938)], where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for

> the same reasons, *viz.*, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law." 387 U.S. at 465.

The companion case decided in *Bosch* further confirms the point. The Supreme Court there affirmed the opinion of this court in *Second National Bank v. United States*, 351 F.2d 489 (1965), where this court had expressly upheld a federal district court's finding that "decrees of the Connecticut Probate Court . . . under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws." 351 F.2d at 494, *aff'g in part* 222 F. Supp. 446, 457 (D.Conn. 1963).

The trustee tries to avoid the consequences of the holdings in *Bosch* by suggesting that the instant case is distinguishable because here the Government appeared in the Surrogate's Court. But the Government only appeared specially, solely to contest that court's jurisdiction. It did not in any way address the merits of the trustee's claim and did not become a party to the proceedings. Indeed, the Surrogate recognized the limited purpose of the Government's appearance in ruling that he had no jurisdiction to affect the tax levy. 80 Misc. 2d at 33-34, 362 N.Y.S.2d at 790. We are bound by the reasoning in *Bosch*, and we conclude that the decision of the Surrogate that Doran had no property rights in the trust was not binding on the district court.

Bosch also provides guidance for a federal court faced, as was the district court, with a state law question on which the highest state court has not yet ruled. The directive of the Supreme Court is that

> "[i]f there be no decision by [the highest state] court then federal authorities must apply what they find to be

> the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court." 387 U.S. at 465.

The district court, a decision by the highest court of New York on the issue before it being lacking, was thus required to sit "as a state court" to decide the case as might a state tribunal, giving proper consideration to the ruling of the Surrogate's Court. Though the question is not without some doubt, we feel that the district court properly decided the merits here.

The relevant part of Mrs. Duncan's trust provision reads as follows:

"Article Third:

• • •

1. This Trust shall be held and administered for the benefit of the family group consisting of those from time to time living of my husband, Matthew Duncan, my son, Thomas W. Doran, his children and the issue of his children. My Trustee shall pay over or use, apply and expend whatever part or all of the net income or principal (even to the point of exhaustion thereof), or both, thereof he shall deem proper or necessary in order to provide comfortable support, maintenance and/or education (at any level) to the individual members of the said family group. My Trustee shall not feel bound, in making such payments, uses, applications or expenditures, to observe any rule or precept of equality as between the individual members of said family group."

While the meaning of these phrases is far from clear, the first sentence sets out in mandatory terms the trustee's duty to pay over: he "*shall pay* . . . whatever part or all of the net income or principal . . . *to the individual members* of the said family group" (emphasis added). The plain meaning of this primary sentence is to direct some payment to *each* beneficiary. The following sentence grants the trustee discretion to divide *such payments* unequally among the beneficiaries, but it does not give him the authority to deny a particular beneficiary anything at all. The trustee's discretion is not to determine who gets something, but rather to decide how much each is to be given. To interpret otherwise would allow the subordinate sentence, designed only to explain the permissible relativity of the payments, to swallow entirely the mandatory directive language.

The New York Court of Appeals has on only two occasions interpreted trust language at all similar to that presented here. The trustee relies heavily upon *Hamilton v. Drogo*, 241 N.Y. 401 (1926), in which the Court of Appeals held that a beneficiary of a testamentary trust did not have any right to income which a creditor could attach. But the will in that case expressly granted to the trustee uncontrolled discretion to use the trust income "for the maintenance and support or otherwise, for the benefit of *all or any one or more exclusively of the other or others of him* my said son" (emphasis added).

The Court of Appeals stressed the importance of this express instruction in discussing the *Drogo* case in *Sand v. Beach*, 270 N.Y. 281, 284-85 (1936). In *Sand*, the trustee was directed to pay the trust income "either direct and in person to my nephew . . . or for the use and benefit of my said nephew and those dependent upon him . . ." The court reasoned that

this directive gave the trustee discretion to distribute income either to the nephew directly or for the benefit of the nephew and his dependents. But absent clear language giving the trustee the choice of withholding all income from the nephew, he could not choose to deny the nephew any income at all.

As the district court found after a reasoned consideration of both these cases, the facts in the instant case are more akin to *Sand* than they are to *Drogo*. The trustee under the Duncan will "shall pay over" what amounts he deems proper "to the individual members of the . . . group." The trustee is bound to distribute some trust income to each of the beneficiaries for their "comfortable support, maintenance and/or education." Nothing in the will, either expressly or by reasonable implication, allows an entire deletion of any beneficiary. Nor is the trustee's own action in making annual payments to Doran from 1968 to October 31, 1973[3] to be ignored. Obviously Doran was considered one of the group regarded as entitled to some distribution.

New York law clearly establishes, moreover, that an aggrieved trust beneficiary can enforce his right to trust property or income against a trustee who refuses to exercise his discretion as directed in the trust instrument. *Matter of Rosenberg*, 269 N.Y. 247 (1935); *Collister v. Fassitt*, 163 N.Y. 281 (1900); *Ireland v. Ireland*, 84 N.Y. 321 (1881).

We also note, though the trustee has not contended otherwise, that the New York Court of Appeals has included taxes within the definition of the term "support" in a case involving enforcement of a federal tax lien against a beneficiary's rights in a spendthrift trust. *Matter of Rosenberg, supra.*

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[3] It is significant that annual payments ceased only after the levying of the Government's tax lien on December 5, 1973.

The district court, after proper consideration of relevant New York cases, found that Thomas W. Doran had a right to property in his mother's trust under New York law, a right which can be attached pursuant to the federal tax lien. We agree with that decision.

Affirmed.

OAKES, *Circuit Judge* (dissenting):

I agree with the majority that the decision of the Surrogate's Court in this case is not binding on the federal courts, but I disagree with its conclusion that the district court, "sitting as a state court," *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967), correctly construed the trust instrument in light of applicable New York law. I would therefore reverse.

The majority concludes, as did the court below, that "[t]he trustee is bound to distribute *some* trust income to each of the beneficiaries . . ." *Ante* at 1951 (emphasis added); *see* 415 F. Supp. at 220. This question is critical because, if the trustee were held not to be so bound, that is, if he could withhold payment from any beneficiary at his discretion, then Mr. Doran, the taxpayer beneficiary here, would concededly have no state property right in the trust income. Without such a right, there is nothing to which the Government tax lien may attach. *See* 26 U.S.C. §§ 6321, 6331; *Aquilino v. United States*, 363 U.S. 509, 512-14 (1960). Significantly, in reaching their respective conclusions, neither the majority nor the court below indicates *how much* trust income the trustee must distribute to any particular beneficiary, and indeed no one could do so, since the decision rests entirely with the trustee

under the terms of the trust instrument. They key sentence directs the trustee to "pay . . . *whatever* part or all of the net income or principal . . . *he shall deem proper or necessary* . . . to the individual members of the said family group" (emphasis added).

If this court and the court below were faced with the problem of determining the amount of money to which Mr. Doran, the taxpayer, had a claim—and thus the amount the Government could take via its tax lien—I believe a different result would be reached from that the parties by stipulation in effect reached here, agreeing as they have upon the amount the trustee will pay to the Government if the Government succeeds on the legal issues. The stipulation, it can be seen, permits the majority opinion to avoid facing the fact that the amount due from the trustee to any particular beneficiary is utterly undefinable and thus to avoid wrestling with the really vital question whether, for example, the payment of one dollar to Mr. Doran, if that sum were deemed "proper or necessary" by the trustee, would satisfy the trustee's obligation to convey, as the majority says, "some" funds from the trust to each beneficiary.

If it is conceded—and nothing I can find in the majority opinion is to the contrary—that a good faith payment of one dollar would satisfy the trustee's obligation to Mr. Doran, I am puzzled how a good faith "payment" of zero can be held not to satisfy that obligation. The difference between zero and one dollar is surely of no consequence either to Mr. Doran or the Government, and many of the beneficiaries of the trust here involved, including Mr. Doran himself for years prior to 1968, have accepted the trustee's failure to give them any payments for several years without, so far as the record

indicates, asking a court to compel him to give them "some" of the trust income. The trust instrument on its face certainly seems to give the trustee the option of deeming zero to be the "proper or necessary" level of funding for any particular beneficiary.

The construction suggested by the words of the instrument and by the inability of anyone to specify what is owed Mr. Doran is that this trust is what has been called a "blended trust." G. G. Bogert & G. T. Bogert, *The Law of Trusts and Trustees* § 230 (2d ed. 1965). According to the *Restatement (Second) of Trusts* § 161 (1959) [hereinafter cited as *Restatement*]:

> If a trust is created for a group of persons and the interest of one member of the group is inseparable from the interests of the others, he cannot transfer his interest and his creditors cannot reach it.

Courts in the twentieth century have apparently always followed the *Restatement* view that a creditor cannot reach interests of this sort, even in cases where, as the majority construes the trust here, the trustee has "no right . . . totally to exclude any one beneficiary from benefits . . ." G. G. Bogert & G. T. Bogert, *supra*, § 230, at 731; *see* A. W. Scott, *The Law of Trusts* § 155, at 1184 (3d ed. 1967) ("Where a trust is created for the benefit of a person and the members of his family, . . . [e]ven if he is entitled to receive part of the income from the trust or to have it applied to his use, his interest may be so inseparable from that of the members of his family that it cannot be assigned and his creditors cannot reach it.") *See also id.* § 161.

The trust here, moreover, is one for "support, maintenance and/or education," with regard to which a beneficiary has no

right to compel payment by the trustee, *see In re Martin's Will,* 269 N.Y. 305, 312-13, 199 N.E. 491, 494 (1936); *In re Cuff's Will,* 118 N.Y.S.2d 619, 624 (Sur. Ct. 1953); *Restatement* § 128, Comment e, and creditors cannot reach the beneficiary's interest, *see Ellis v. Chapman,* 165 App. Div. 79, 150 N.Y.S. 673 (1914); *Restatement* § 154. *See also Restatement* § 182, Comment c. While the claim of the Government for taxes might be enforceable against the interest of a sole beneficiary of a trust for support, *see Restatement* § 157(d); *cf. In re Rosenberg,* 269 N.Y. 247, 199 N.E. 206 (1935) (federal tax lien enforceable against beneficiary's interest in spendthrift trust), *cert. denied,* 298 U.S. 669 (1936), this rule does not apply when, as here, there are several beneficiaries with inseparable interests, *see Herzog v. Commissioner,* 116 F.2d 591, 594 (2d Cir. 1941) (A. Hand, *J.*).

The problem of determining what amount is due Mr. Doran illustrates the soundness of the well-settled New York rule that the courts will not interfere on behalf of a creditor of a beneficiary with the exercise of the discretion vested in the trustee. *Sand v. Beach,* 270 N.Y. 281, 284, 200 N.E. 821, 822 (1936); *Hamilton v. Drogo,* 241 N.Y. 401, 404, 150 N.E. 496, 497 (1926); 26 Colum. L. Rev. 776, 776 (1926); *see Restatement* § 155(1). In the one case relied on in the majority and district court opinions for the conclusion that "some" income must be paid out here, *Sand v. Beach, supra,* there was no interference with the trustee's discretion because the judgment debtor had a right "to require payment to him of the *entire* net income of the trust fund," either directly or through "its application for his use and benefit." 270 N.Y. at 286, 200 N.E. at 823 (emphasis added). A case in which the entire trust income must be paid to one beneficiary is

manifestly different from the instant case, in which the most the majority can say is that "some" unspecified amount of trust income is due each of several beneficiaries. In the former or *Sand v. Beach* situation, it makes sense to require that the defined sum owed to a single, specific beneficiary be paid to his creditor. Here, where the trustee has virtually complete discretion to allocate funds among several beneficiaries, it makes no sense to impose a similar requirement, since the other beneficiaries, in favor of whom the trustee might otherwise exercise his discretion, will be the losers—the last result a settlor would wish.

The result reached by the majority thus violates the New York rule against interfering with a trustee's discretion and is not supported by the principal case the majority relies upon. The practical result it seems to countenance, moreover, by which a one dollar payment would be sufficient but a zero "payment" would not, cannot be seriously intended by my brothers in the majority, who concededly are spared having to face the question by a stipulation that may have made this case appear simpler than it is, but that should not control the legal result reached. I would reverse the judgment.

APPENDIX "C".

Judgment of the Court of Appeals
(Filed February 24, 1977).

UNITED STATES COURT OF APPEALS

For The Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of February one thousand nine hundred and seventy-seven.

Present:

Hon. Leonard P. Moore
Hon. James L. Oakes
Hon. William H. Timbers, *Circuit Judges*,

SAMUEL D. MAGAVERN, as Executor and Trustee of The Last Will and Testament of MARGARET C. DUNCAN, Deceased,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

76-6111

Appeal from the United States District Court for the Western District of New York.

Appendix "C"—Judgment of the Court of Appeals.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the plaintiff-appellant.

A. DANIEL FUSARO,
Clerk.

By Vincent A. Carlin,
Chief Deputy Clerk.

APPENDIX "D".

Decision and Order of the District Court (Entered June 8, 1976).

UNITED STATES DISTRICT COURT

Western District of New York

SAMUEL D. MAGAVERN, As Executor and Trustee of The Last Will and Testament of MARGARET C. DUNCAN, Deceased,

Plaintiff.

vs.

UNITED STATES OF AMERICA,

Defendant.

Civ-74-405

CURTIN, District Judge

Appearances:

Magavern, Magavern, Lowe & Beilewech (Samuel D. Magavern, Esq. & Charles B. Draper, Esq., of Counsel), Buffalo, New York, for Plaintiff.

Richard J. Arcara, Esq., United States Attorney, (Roger P. Williams, Esq., of Counsel) Buffalo, New York for the Government.

Appendix "D"—Decision and Order of the District Court.

This case had it origin in the will of one Margaret C. Duncan, who, when she died in 1965, left the residue of her estate in trust for her husband, her son Thomas W. Doran, and the children and grandchildren of Thomas W. Doran. We are concerned with Thomas W. Doran, the son, who was deficient in his tax payments for various amounts in the years 1965, 1966, 1968, 1969, 1970 and 1971. The Government filed notices of assessment under 26 U.S.C. §§6201, 6203 at various times from 1967 to 1972 and, on December 5, 1973, the trustee was served a notice of levy under 26 U.S.C. §§6321, 6331 by the Internal Revenue Service. The levy purported to cover "all property and rights to property . . . belonging to" Thomas W. Doran.

On August 23, 1974, the plaintiff-trustee brought suit under 26 U.S.C. §7426(a)(1), attacking the Government's levy. Presently before the court are the plaintiff's motion for summary judgment in which the plaintiff asks the court to cancel the Government's notice of levy, and the defendant Government's cross-motion for partial summary judgment asking the court to find the tax lien against the trustee valid and that the trustee be ordered to comply with it.

The plaintiff claims that he holds no property or rights to property of Thomas Doran, and therefore that the levy is wrongful. The Government, on the other hand, urges that under the terms of the trust, Mr. Doran has property or rights to property in the trust income and principal, and the trustee, as holder of the property, was lawfully served with the tax lien. Mr. Doran died February 19, 1975. His tax liability is not contested by the parties.

Both sides agree that the starting point for analysis is *Aquilino v. United States*, 363 U.S. 509 (1960). In that case, in-

volving the question of the priority of a federal tax lien, the Supreme Court stated:

> The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had "property" or "rights to property" to which the tax lien could attach. In answering that question, both federal and state courts must look to state law . . . However, once the tax lien has attached to the taxpayer's state-created interests, we enter the province of federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayer's "property" or "rights to property." 363 U.S. at 512-514 (citations omitted, footnotes omitted).

The plaintiff, prior to instituting this action, commenced an action in Surrogate's Court of Erie County on June 27, 1974, seeking a determination of the question now before this court. The plaintiff claims that the Surrogate's ruling that the trust beneficiaries have no property rights in the trust, and specifically that Thomas W. Doran has no property rights in the trust, is conclusive of the issue in this case. *In re Will of Duncan*, 362 N.Y.S.2d 788, 792, 80 Misc.2d 32 (Sur.Ct. Erie Co. 1974). However, the Supreme Court in *Commissioner v. Bosch*, 387 U.S. 456 (1967), ruled that a federal court is not "conclusively bound by a state trial court adjudication of property rights or characterization of property interests when the United States is not made a party to such proceeding." 387 U.S. at 456-457. The Court indicated that, as in diversity cases, the federal court must look to the state's highest court as the best authority on that state's law and that, in the absence of a ruling by that court, "proper regard" should be

given to the decisions of that state's lower courts. 387 U.S. at 465.

The Government appeared before the Surrogate solely to contest that court's jurisdiction. It did not argue the merits of plaintiff's claim. The Surrogate ruled that he had no jurisdiction over the Government with respect to the tax levy, but that he maintained jurisdiction over the construction of the Duncan will and could decide "whether the trust beneficiaries have any property rights in the trust." *In re Will of Duncan, supra*, 362 N.Y.S.2d, at 790.

The plaintiff argues that the Surrogate's will construction binds the Government since the proceeding was *in rem*, but the cases cited by plaintiff in his brief before the Surrogate and before this court are not clear on this point. If the plaintiff's contention were upheld, then questions of federal tax liability could be routinely and conclusively decided by lower state courts. Such a procedure does not stand up under the guidelines of the *Bosch* case.

This Court agrees with the Government that the will construction was *ex parte* and not binding on it. Therefore, although not bound by his ruling, we must consider the conclusions of the Surrogate. No other New York cases appear to be directly on point.

The pertinent part of the trust provision, "ARTICLE THIRD", reads:

> 1. This Trust shall be held and administered for the benefit of the family group consisting of those from time to time living of my husband, MATTHEW DUNCAN, my son, THOMAS W. DORAN, his children and the issue of his children. My Trustee *shall pay over or use*, ap-

> ply and expend whatever part or all of the new income or principal (even to the point of exhaustion thereof), or both, thereof he shall deem proper or necessary *in order to provide comfortable support, maintenance and/or education* (at any level) *to the individual members of the said family group. My Trustee shall not feel bound,* in making such payments, uses, applications or expenditures, *to observe any rule or precept of equality as between the individual members of said family group.* (Emphasis added).

The Surrogate ruled that since the trust is discretionary, and since the trustee need not distribute the trust income or principal equally among the beneficiaries, "[t]he only interest of Thomas W. Doran and the other beneficiaries of the trust is merely one of expectancy, and the trustee cannot be compelled to transfer to any member any part of the trust property." *In re Will of Duncan, supra,* 362 N.Y.S.2d, at 791. According to the Surrogate,

> It is clearly the law that where a trustee in administering the trust is given absolute discretion as to the application of income or principal to one or more of a group of beneficiaries without being bound to observe any rule or precept of equality, that the beneficiaries have no absolute right to receive income from the trust, their gift being "only of so much as the trustee shall properly determine to apply". Matter of Connolly, 71 Misc. 388, 389, 130 N.Y.S. 194, 195 [(Sur.Ct. Kings Co. 1911)]; Hamilton v. Drogo, 241 N.Y. 401, 150 N.E. 496 [(1926)]. 362 N.Y.S.2d at 791.

In *Connolly,* the guardian of will legatees asked the court to order the trustee "to pay him certain income, in order that he

may use it in part to reimburse himself for past expenditures in taking care of his children, and in part to provide for their future care and maintenance." *Matter of Connolly, supra,* 130 N.Y.S. at 195. The Surrogate in that case rejected the guardian's application, ruling that when a trust gives the trustee discretion in determining income distribution, "it is not for either the guardian or the court to interfere with the function of the trustee, *unless* it appear that he is exercising it perversely or unreasonably." 130 N.Y.S. at 195 (emphasis added). The Surrogate also pointed out that the will in that case made no provision for support or maintenance, but only for education.

In *Drogo,* the will provided that the trustee use the trust income "for the maintenance and support or otherwise, for the benefit *of all or any one or more exclusively of the other or others of him* my said son . . . as my . . . trustees in their sole and uncontrolled discretion . . . think fit." *Hamilton v. Drogo, supra,* 241 N.Y., at 403 (emphasis added). The crucial word in the terms of this will was "exclusively," and it was the use of this word that gave the trustee the discretion to decide whether or not to pay some trust income or none at all to an individual trust beneficiary. This distinction was pointed out by the New York Court of Appeals in a later case. *Sand v. Beach,* 270 N.Y. 281 (1936). In *Beach,* the trustee was given discretion to pay the trust income "either direct and in person to my nephew . . ., or for the use and benefit of my said nephew and those dependent upon him, during his lifetime, and in the manner and amounts . . . said trustee . . . in his discretion may deem best . . ." 270 N.Y., at 283.

The New York Court of Appeals ruled in *Beach* that the use of the word "or" gave the trustee the choice of distributing

trust income to either the nephew or the nephew and those dependent upon him. It did not, however, give the trustee the choice of not giving any trust income to the nephew at all. The Court distinguished *Drogo,* because in *Drogo* the terms of the trust gave the trustee the discretion to distribute trust income to one or more of the beneficiaries, exclusive of the other beneficiaries.

Here, our situation is more similar to *Beach* than to *Drogo.* The trustee, under the Duncan will, "shall pay over or use" the income or principal "he shall deem proper or necessary in order to provide comfortable support, maintenance . . . to the individual members of the said family group." Therefore, although the trustee is not bound by the will to give equal allotments to each beneficiary, he is bound to distribute some trust income to each of the individual beneficiaries for their "comfortable support." Nothing in the will allows the trustee to delete any beneficiary totally.

In the years directly preceding the Government's levy of December 5, 1973, the trustee distributed the following amounts to Thomas W. Doran.

1968	$1,500.00
1969	2,000.00
1970	1,039.61
1971	3,000.00
Jan. 1, '72—Oct. 31, '72	2,000.00
Nov. 1, '72—Oct. 31, '73	3,500.00

Memorandum of Government at 2.

Although the courts will not ordinarily interfere with the discretion of the trustee, this rule is not ironclad. If the

trustee fails "to honestly and fairly exercise the discretion vested in [him]," *Collister v. Fassitt,* 163 N.Y. 281, 292 (1900), then a court will step in, at the beneficiary's behest, and determine the amount due the beneficiary. In *Ireland v. Ireland,* 84 N.Y. 321 (1881), the court interpreted the trust provisions as granting the trustee discretionary power over the income distribution to the various beneficiaries, but stated that a trustee's discretion can be "controlled" by a court of equity. 84 N.Y. at 328.

It appears, then, that even if the trustee is granted discretion over the amount of trust income to be distributed to individual trust beneficiaries, the individual beneficiary of the trust, as long as the trustee is directed to pay some trust income to him, can compel the trustee to exercise his discretion reasonably. To that extent, the beneficiary has a "right to property" under New York law.

A similar situation confronted a federal district court in the Northern District of California in the case of *United States v. Taylor,* 254 F.Supp. 752 (N.D.Cal. 1966). The court stated:

> The trust being one fundamentally for support, the taxpayer has a basic beneficial right to receive payments from income to the extent needed for his support. It follows that the government liens have attached to and subsist against that right. 254 F.Supp. at 756.

The federal tax lien is pervasive. In referring to the wording of 26 U.S.C. § 6321, the Supreme Court has stated that "[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank v. United States,* 326 U.S. 265, 267 (1945). We conclude that under New York State law, the beneficiary had "rights to

property" in that he had a right to a reasonable sum under the settlor's instruction for his "maintenance and care," and that therefore the Government's levy is valid. The determination of the actual amount of trust income and/or principal reached by the levy must await trial.

The trustee's motion for summary judgment is denied; the Government's motion for partial summary judgment declaring the tax lien valid is granted.

So ordered.

JOHN T. CURTIN,
John T. Curtin,
United States District Judge.

Dated: June 8, 1976.

Appendix "E".

Opinion of New York State Surrogate's Court of Erie County.

In re WILL of Margaret C. DUNCAN, Deceased.

Petition of Samuel D. MAGAVERN, Executor and Trustee of the Last Will and Testament of Margaret C. Duncan, Deceased.

Surrogate's Court, Erie County.
Dec. 27, 1974.

Samuel D. Magavern, Buffalo, for petitioner.

John T. Elfvin, U. S. Atty., Roger P. Williams, Buffalo, of counsel, for the United States.

WILLIAM J. REGAN, Surrogate.

The trustee of the Last Will and Testament of Margaret C. Duncan has petitioned this court to determine the validity and effect, if any, of a notice of levy served upon him in his fiduciary capacity as trustee, purporting to attach all the property, rights to property, moneys, credits and bank deposits in the petitioner's possession and belonging to Thomas W. Doran, one of the beneficiaries of the trust. The pertinent provision of the trust in issue is contained in Article Third of said Will and reads as follows:

> "ARTICLE THIRD: 1. This Trust shall be held and administered for the benefit of the family group consisting of those from time to time living of my husband, MATTHEW DUNCAN, my son, THOMAS W. DORAN, his children and the issue of his children. My Trustee

shall pay over or use, apply and expend whatever part or all of the new income or principal (even to the point of exhaustion thereof), or both, thereof he shall deem proper or necessary in order to provide comfortable support, maintenance and/or education (at any level) to the individual members of the said family group. My Trustee shall not feel bound, in making such payments, uses, applications or expenditures, to observe any rule or precept of equality as between the individual members of said family group."

The initial issue confronting this court is whether this court has jurisdiction to vacate, cancel or discharge the levy served on the trustee by the Internal Revenue Service. The law is well settled that the United States in filing a proof of claim in a probate proceeding, implicitly consents to the jurisdiction of the probate court to determine the validity of its claim. The levy filed in the instant matter, however, is not concerned with proceedings pertaining to the judicial settlement of the Last Will and Testament of Margaret C. Duncan, but rather concerns the property rights, if any, of Thomas W. Doran, one of the possible beneficiaries of the trust.

The affirmative act of filing a proof of claim invokes the jurisdiction of the Surrogate Court to direct the distribution of estate assets in accordance therewith. The cases cited and relied upon by the petitioner concern themselves with the determination of claims by the government in probate proceedings, and not with actions with respect to creditor's rights to a beneficiary's interest thereunder.

A levy served, as in this case, after the conclusion of the probate proceedings, effects an administrative seizure of

assets and no authority of any court is necessary to give weight or legitimacy to its effect. U. S. v. Eiland, 223 F.2d 118 (Fourth Circuit 1955). The United States Congress has provided an adequate remedy by an aggrieved party to attack a levy which is claimed to be wrongfully asserted. Sec. 7426(a) of the Internal Revenue Code of 1954 provides petitioner with this remedy. Judicial interpretation of this section indicates that this remedy is to be pursued only in the Federal District Court. To decide that this court has jurisdiction or power to determine this issue would exceed its powers and jurisdiction conferred upon it by the New York State constitution and statutes enacted therein.

This court therefore finds that it does not have the authority or jurisdiction, to vacate, annul, cancel or discharge the levy served upon the trustee. It is noted that the petitioner has in fact commenced a proceeding pursuant to the provisions of Section 7426(a) of the Int.Rev.Code in the Federal District Court for the Western District of New York for relief.

Although this court is without jurisdiction and power to determine the validity of the levy, it maintains jurisdiction over the Last Will and Testament of the deceased and the construction and effect of any provisions of said Last Will and Testament. The question which must be decided is whether the trust beneficiaries have any property rights in the trust which was created in Article Third of said Last Will and Testament.

Under the New York law an express trust vests in the trustee the legal estate subject only to the execution of the

trust and the beneficiary does not take any legal estate in the property. E.P.T.L. 7-2.1(a).

The nature of a beneficiary's interest in property subject to a trust is an equitable interest only with the right to enforce the trust provisions pursuant to its terms. Van Cott v. Prentice, 104 N.Y. 45, 10 N.E. 257.

According to the terms of the instant trust instrument, the beneficiaries collectively designated as a family group, of which Thomas W. Doran is a member, was created for providing comfortable support, maintenance and/or education to any one or more of the members of said fami'y group. The trustee has complete and sole discretion pursuant to the terms of the trust to apply and expend the income or principal for the support of any one or all of the members of said family group. The trustee is further authorized not to observe any rule or precept of equality as between the members of said family group.

It is clearly the law that where a trustee in administering the trust is given absolute discretion as to the application of income or principal to one or more of a group of beneficiaries without being bound to observe any rule or precept of equality, that the beneficiaries have no absolute right to receive income from the trust, their gift being "only of so much as the trustee shall properly determine to apply". Matter of Connolly, 71 Misc. 388, 389, 130 N.Y.S. 194, 195; Hamilton v. Drogo, 241 N.Y. 401, 150 N.E. 496. It is also established that where you have a discretionary trust, a creditor of one of the beneficiaries cannot compel the trustee to pay any part of the income or principal to the beneficiary.

Wetmore v. Truslow, 51 N.Y. 338; Myers v. Russell, 60 Misc. 617, 112 N.Y.S. 520; 2 Scott on Trusts, 3rd Ed., Sec. 155. The creditor, in this case the United States Government, cannot compel the trustee to make a payment pursuant to the terms of the trust where the beneficiary, individually, could not compel the trustee to make such a payment.

Where the discretion is conferred upon a trustee, the courts will not interfere with the exercise of its discretion. Matter of Emmons, 165 Misc. 192, 300 N.Y.S. 580; Matter of Littman, 165 Misc. 285, 300 N.Y.S. 398.

The only interest of Thomas W. Doran and the other beneficiaries of the trust is merely one of expectancy, and the trustee cannot be compelled to transfer to any member any part of the trust property. Morrow v. Apple, 58 App.D.C. 171, 26 F.2d 543. Morrow v. Apple held that since beneficiary had not absolute right to either income or principal, neither was within the reach of the beneficiary's creditors.

It is the decision of this court that the beneficiaries of the trust created under the Last Will and Testament of Margaret C. Duncan have no absolute right to receive income or principal from the trust and that therefore there is no property or rights to property belonging to the beneficiaries, specifically Thomas W. Doran, the subject of the levy. If, however, the trustee does at any time elect in his discretion to pay to Thomas W. Doran any of the income or principal of the trust, the amoun of said payment will be subject to the levy unless the levy has been removed or vacated by the Federal District Court.

APPENDIX "F".

Order of New York State Surrogate's Court of Erie County.

At a Surrogate's Court, held in and for the County of Erie, State of New York, at the County Hall, in the City of Buffalo, New York, on the 27th day of January, 1975.

Present: Hon. William J. Regan, *Surrogate.*

SURROGATE'S COURT
County of Erie—State of New York

In the Matter of the Petition
of
SAMUEL D. MAGAVERN, Executor and Trustee of the Last Will and Testament,
of
MARGARET C. DUNCAN, Deceased.

File No. D 6044.

This matter having come up before the Court on a petition of Samuel D. Magavern, Executor and Trustee of the Last Will and Testament of Margaret C. Duncan, to determine the construction and effect of certain provisions of said Last Will and Testament and the validity and effect, if any, of a Notice of Levy served upon him in his fiduciary capacity as trustee, purporting to attach all property, rights to property, moneys, credits and bank deposits in the petitioner's possession and

belonging to Thomas W. Doran, one of the beneficiaries of the trust, and there appearing on behalf of petitioner, Magavern, Magavern, Lowe & Beilewech, Messrs. Samuel D. Magavern and Charles B. Draper, of counsel and John T. Elfvin, U. S. Attorney, Roger B. Williams, Esq., of counsel, for the United States Government and upon hearing the arguments of counsel and examining into memorandum and the law in such cases made and provided, it is

ORDERED, ADJUDGED and DECREED, that this Court maintains jurisdiction over the Last Will and Testament of the deceased, Margaret C. Duncan and the construction and effect of any provisions of said Last Will and Testament, and it is further

ORDERED, ADJUDGED and DECREED, that the trust beneficiaries of the Estate of Margaret C. Duncan, do not have any property rights in the trust which was created in Article Third of said Last Will and Testament which reads as follows:

> "*ARTICLE THIRD:* 1. This trust shall be held and administered for the benefit of the family group consisting of those from time to time living of my husband, MATTHEW DUNCAN, my son, THOMAS W. DORAN, his children and the issue of his children. My Trustee shall pay over or use, apply and expend whatever part or all of the new income or principal (even to the point of exhaustion thereof), or both, thereof he shall deem proper or necessary in order to provide comfortable support, maintenance and/or education (at any level) to the individual members of the said family group. My Trustee shall not feel bound, in making such payments, uses, ap-

plications or expenditures, to observe any rule or precept of equality as between the individual members of said family group."

and it is further

ORDERED, ADJUDGED and DECREED, that, therefore, there is no property or rights to property belonging to beneficiaries, specifically Thomas W. Doran, the subject of this levy, and it is further

ORDERED, ADJUDGED and DECREED, that Magavern, Magavern, Lowe & Beilewech, as attorneys for petitioner, be allowed the sum of $2500.00 for their services rendered herein.

WILLIAM J. REGAN,
Surrogate.

ENTER: